Development & Commercial Bank Bhd v Government of Malaysia & Ors

HIGH COURT (ALOR SETAR) - ORIGINATING MOTION NO 25-11-1989
KC VOHRAH J
6 AUGUST 1989

Land Law - Order for sale obtained prior to registrar's caveat - Application to delete reference to s 321(3)(c) of National Land Code in title of motion - Whether proceedings can come under s 417 of the Code - Remedies prescribed by s 321(3)(c) to be read with s 418 - National Land Code 1965, ss 320, 321(3)(a), (b), (c), 417 & 418

Limitation - Period intended by Parliament to prevent stale claims - Claim filed well past period of three months - National Land Code 1965, s 418

The plaintiff company obtained a court order in 1987 for the sale of a piece of land charged to the plaintiff company to secure banking facilities. In August 1988, the Registrar of Land Titles entered a registrar's caveat at the request of the Director-General of Inland Revenue to protect the Federation's interest as the chargor had not settled his taxes. A caveat was entered under s 320(1)(b)(i) and (ba) of the National Land Code ('the Code'). Notice of the entry was served on the chargor and the plaintiff. The plaintiff's solicitor wrote to the Inland Revenue Department to remove or cancel the caveat but to no avail. An originating motion was filed applying for, inter alia, an order that the registrar's caveat be removed or cancelled. The counsel for the plaintiff applied to delete the reference to s 321(3)(c) of the Code as she intended to proceed under s 417.

Held, dismissing the plaintiff's motion:

(1) The application cannot proceed under s 417. Section 321(3) prescribes specific instances under which the registrar's caveat may be cancelled and the remedy available to the plaintiff company is prescribed by s 321(3)(c). The application should be an appeal against the decision of the registrar entering the caveat under s 321(3)(c) read with s 418, but the plaintiff company had failed to do so.

(2) In any event, the limitation period for appeal under s 418 was well past, and there is no remedy available to the plaintiff company.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 01-30 of 1989.]

Case referred to

1 *Land Executive Committee of Federal Territory* v *Sykt Harper Gilfillan Bhd* [1981] 1 MLJ 234 (folld)

Legislation referred to

National Land Code 1965 ss 256, 320(1), 321(3), 417, 418

Poh Ah Loy @ Poh Ah Ley (Ms) for the plaintiff company.
Balia Yusof for the first and second defendants.
Abdul Malik bin Haji Ishak for the third defendant.

Cur Adv Vult

KC Vohrah J: On 3 October 1987 Development and Commercial Bank, the plaintiff company, obtained a court order for the sale of a piece of land under s 256 of the National Land Code. The land had been charged by one Tan Hai Teng to the plaintiff company to secure the repayment of banking facilities given by the plaintiff company to a third party. On 23 August 1988 the Registrar of Land Titles, Kedah, entered a registrar's caveat on the said land. This was after he had received a letter of request from the Alor Setar office of the Director-General of Inland Revenue (the second defendant) to enter a registrar's caveat on the said land for the protection of the Federation's interest. The reason given in the letter for such a request was that Tan Hai Teng had not settled his income tax with the Government of Malaysia. The registrar in his affidavit said that he had entered the caveat acting under paras (b)(i) and (ba) of s 320(1) of the National Land Code. Tan Hai Teng, the registered proprietor of the land, as well as the plaintiff company, the chargee of the land, were served with a notice of entry of the registrar's caveat on the said land. In the case of the plaintiff company it was served on 2 December 1988.

The plaintiff company on 28 December 1988 in a letter through their solicitors to the senior assistant director of the Inland Revenue Department, Kuala Lumpur requested the registrar's caveat to be removed or cancelled but this was to no avail. On 16 April 1989 the plaintiff company filed this originating motion applying for, inter alia, an order that the Registrar of Titles cancel or remove the said registrar's caveat.

It will be noted that s 321(3) spells out the instances under which a registrar's caveat may be cancelled by the registrar. It states:

> A Registrar's caveat shall continue in force until it is cancelled by the Registrar
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> a of his own motion; or
> b on an application in that behalf by the proprietor of the land affected; or
> c pursuant to any order of the Court made on an appeal under section 418 against his decision to enter the caveat, or his refusal of any application for its cancellation under paragraph (b).

Although this application by way of originating motion purports to be predicated on s 321(3) (c) and appears to be an appeal, in form and context it is not an appeal. There was an application to delete the reference to s 321(3)(c) of the Code appearing in the title of the motion and counsel for the plaintiff stated that she intended to proceed under s 417 of the Code as it was not necessary that the application before me should have gone by way of appeal under s 418 of the Code.

With respect to learned counsel I do not agree with her view that her application could have proceeded under s 417. Section 321(3) prescribes specific instances under which the registrar's caveat may be cancelled and the plaintiff company had a remedy open to it as is prescribed by s 321(3)(c). Under paragraph (a) of s 321(3) the regis-

trar may cancel the caveat on his own motion. Under para (b) the registrar may cancel the caveat on an application by the proprietor of the land. If the registrar refuses to cancel the caveat on such an application by the proprietor of the land the proprietor may under para (c) of s 321(3) make an appeal under s 418 of the Code against the registrar's refusal to cancel the caveat.

If there is a person other than the proprietor who is aggrieved by the registrar's decision to enter the caveat, that person may, as is provided for under para (c) of s 321(3), appeal under s 418 of the Code.

Here is a case where the plaintiff company, as chargee of a piece of land, had obtained a court order to sell the land. And the court order was obtained earlier than the date on which the registrar's caveat was entered on the said land. When it received notice of the entry of the registrar's caveat it cannot be gainsaid that it was aggrieved at the decision of the registrar to enter his caveat. The remedy that was open to the plaintiff company was to appeal against the decision of the registrar entering the caveat, proceeding under s 321(3)(c) read with s 418 of the Code. This was not done.

This originating motion, even assuming it can be considered as being in the nature of an appeal, was filed well past the period limited for appeal under s 418 of the Code and clearly was stale at the time it was filed. I find support for this view in the Federal Court case of *Land Executive Committee of Federal Territory* v *Sykt Harper Gilfillan Bhd*[1] at p 237 where Raja Azlan Shah Ag LP (as he then was) stated:

> ... Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if an indefinite period were intended to be given. The period of three months is obviously for the purpose of preventing stale claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it.

Since there was no other remedy available to the plaintiff company to have the registrar's caveat cancelled there was no point in allowing counsel's oral application to delete the reference to s 321(3)(c) in the title of the motion and to have the matter considered under s 417 of the Code. Accordingly I dismissed the motion with agreed costs of $400 to the first and second defendants and $300 to the third defendant.

Motion dismissed.

Solicitors: *Jin-Nge & Co.*

Reported by *Yap Shao Sin*

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd

HIGH COURT (PENANG) - CIVIL SUIT NO 29 OF 1981
EDGAR JOSEPH JR J
1 AUGUST 1989

Contract - Terms - Importation of terms from previous course of dealing - Breach of contract

Contract - Damages - Measure of damages - Proof of damage - Nominal damages

Evidence - Proof - Admissibility - Oral evidence based on documents not tendered as evidence - Statement of account allegedly extracted from books of account - Books not tendered as evidence - No objection taken to admission - Whether oral evidence and statement of account admissible - Evidence Act 1950, ss 34, 65 & 104

Sale of Goods - Commercial credit - Time for opening of credit - Breach by seller of contract for sale of goods - Damages - Measure of damages - Proof - Market price - Loss of profits - Nominal damages

Words and Phrases - 'Letter of credit, 60 days sight'

The plaintiffs, who were a company carrying on business in Canada, commenced an action against the defendants, who were a company carrying on business in Malaysia, claiming damages for non-delivery of goods alleging loss of profits on resale. The plaintiffs alleged that by 26 contracts in writing - all in a printed common form and prepared by the plaintiffs - the plaintiffs ordered and the defendants agreed to deliver certain goods. The defendants raised two points. They said that there was no concluded contract as alleged or at all and that the alleged contracts were merely order forms, the acceptance thereof being subject to a condition precedent that the plaintiffs had to open irrevocable letters of credit in favour of the defendants at least 60 days before shipment and the plaintiffs having failed to do so in respect of all of the contracts, there never was any concluded contract. Alternatively, it was contended that even if there were concluded contracts, the defendants were discharged from performing their part of the contracts by reason of the failure of the plaintiffs to provide any letter of credit.

At the trial, the plaintiffs adduced evidence to the effect that throughout the plaintiffs' dealings with the defendants, letters of credit had usually been opened 15 to 90 days before shipment and that in the majority of cases, letters of credit were opened 45 to 60 days prior to a given shipment date. It was also the practice that the defendants would inform the plaintiffs of the name of the ship and the date of the shipment after which the plaintiffs would open the letters of credit. To prove their claim for damages, the plaintiffs called as a witness an accountant who was a partner of the firm of accountants who were the auditors and accountants of the plaintiffs. The accountant produced a sheet of calculations (marked as exh P76) which was meant to show the estimated losses suffered by the plaintiffs as a consequence of the defendants' non-delivery of the goods. It was contended by the plaintiffs that the oral testimony of the accountant and exh P76 were based on the results of his examination of the account books of the plaintiffs for the relevant period. The account books themselves were never produced and the defendants never dispensed with formal proof of the loss of profits alleged or at all.